No. 41.
Reply Brief of Montague for Appellant
Filed Oct. 1, 1898.

IN THE

Supreme Court of the United States.

No. 41.

I. R. HARKRADER, Sheriff and Keeper of Wythe county Jail, Virginia, Appellant,

v.

H. G. WADLEY, Appellee.

REPLY BRIEF FOR APPELLANT.

A. J. MONTAGUE,
Attorney-General of Virginia,
and ex-officio Counsel for Appellant.

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First.

The brief of the appellee contends that this is not an appeal from the judgment of the Circuit Court, but that it is an appeal from the judgment of the Circuit Judge, sitting at chambers.

In the latter case it is conceded that no appeal lies. But such is not the fact in the case at Bar. Here the original order was made at chambers, but that same order was subsequently made and entered in the Circuit Court of the United States, in term (R., 12), and is, therefore, within the very rulings of the cases cited in the brief of appellee. In *In re Palliser*, 136 U. S., 262, the *habeas corpus* proceedings were disposed of by the judge at chambers, yet this order was sub-

sequently made the order of the United States Circuit Court, and it was from the latter order that the appeal was properly perfected. *McKnight* v. *James*, 155 U. S., 685, cannot be cited as a very pertinent authority. The appeal was defective in that case for two reasons: First, that it was from an order of the State Circuit Judge at chambers; and Second, that the appeal was not from the highest Court of the State. However, Mr. Justice Brown, after observing the method of treatment of the jurisdiction of the State Court by the brief of the plaintiff in error, in which it was maintained that the Circuit Court was the highest court of the State, *quoad* that case, uses this suggestive language, which completely sustains the appeal in the case at Bar:

> "In this view, petitioner should at least have applied to that court for a writ of error, or had the order of the Circuit judge at chambers made the order of the Circuit court."

Thus, in the case at Bar, the order of the Circuit Judge at chambers was made the order of the Circuit Court, and therefore the action, as shown by the record, is completely within the rulings and suggestions of Mr. Justice Brown as above quoted.

SECOND.

The further contention of the appellee is that the judgment was not final, and hence not appealable.

The cases of *Carter* v. *Fitzgerald* and *McLish* v. *Roff*, cited by appellee, are not of sufficient pertinence to be of weight. In the first place the appellee was not discharged "pending said injunction." This might or might not have been the purpose of the Court. The order simply recites that he was discharged "from the custody of said court, as said court cannot prosecute said indictment pending said injunction." (R., 12.) There is no restriction in the order that when the injunction has been disposed of the United States Court would return the prisoner, the appellee, to the State of Virginia. But conceding that the United States Court intends to return the prisoner

to the State Court for prosecution at some future day, yet it is submitted that such action on the part of the Federal Court is final in its character. Is not the taking away from the State the right to exact bail of its own criminals, and the right, therefore, to administer its own justice and its own criminal proceedings, an act so final in its character as to warrant the interposition of this Court for a review of such proceedings? The instant the right to exact bail, or to prevent further prosecution of the accused is taken away, then such a final act has occurred as to justify this appeal. The order prohibiting the State Court to exact bail is substantive, definitive and complete in itself. It is sufficient in itself to destroy the State's authority and to prevent the proper administration of her criminal laws. It is the stopping of the State Court in the progress of its proceedings, rather than the obstructing them for any length of time, that is the question involved. It adjudicates a right of the most paramount character, vital to the very existence of the State itself, and therefore the adjudication is so final in its character as to warrant the fullest intervention of this Court to review these proceedings.

THIRD.

In the former brief of the appellant, on page 3, the Court will find a discussion of the failure of the record to contain the formal certificate of the question of jurisdiction; and it cannot now be perceived that the argument there advanced as to the immateriality of the absence of a mere mechanical certificate needs further elaboration.

The contention of the appellee must fall unless, as has been before observed, this court should "put vital stress upon the mere mechanical form of the certificate itself," for the pleadings unmistakably show that this question alone is presented, and affirmatively presented.

One of the elementary and essential averments in the petition for a writ of *habeas corpus* is that the court or judge has jurisdiction to grant the writ. Indeed, the chief function of the writ of *habeas corpus* appertains to jurisdictional questions.

> "The only ground upon which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or cause, or some other matter rendering its proceedings void."
>
> *Ex parte Siebold*, 100 U. S., 732.
> *Ex parte Lennon*, 166 U. S., 553.

Thus the very nature of the proceedings present the one question of jurisdiction, and therefore, under the rulings of this court, the certificate itself is not essential, and this case is properly in this court upon appeal.

In the case of *Van Wagenen* v. *Sewell*, cited in appellee's brief, the court held that if it clearly appeared in the decree of the court below that no other question than that of jurisdiction was involved, the certificate was not necessary. But in that case the question of jurisdiction could only be found, if found at all, in a general demurrer to the bill for want of equity, and manifestly the demurrer could not properly raise the question of jurisdiction.

Nor does the case of *Chappell* v. *United States*, cited by the appellee, present any controlling analogies either of fact or pleading, to the case at Bar. In that case the question of jurisdiction was vaguely presented "among many other defenses," and the jurisdictional question was neither alone involved nor made to appear in any affirmative manner in the pleadings or judgment of the Court. Therefore, the Court clearly differentiated that case from the rulings of *Re Lehigh M. & M. Co.*, *Interior Const. & I. Co.* v. *Gibney*, and the like class of cases, the principles of which differentiation are relied upon here as bringing this case clearly within the scope of appellate review.

And likewise the case of *Davis* v. *Geissler*, cited by the appelee, is of no direct bearing. In that case not all of the defendants appeared, "but the defendants in error did, and pleaded a modified general denial, and twelve other defenses,

setting up fraud in respect of the contract, non-performance, want of jurisdiction in that one of the defendants, B. Mohanna, was a co-citizen of Illinois with plaintiffs, and that Mohanna's subscription to the contract was really a subscription by plaintiffs, made by him as their agent." From this copious category of defenses it would be difficult indeed to find the question of jurisdiction alone involved in the absence of any certificate covering the precise question. But how different is the case at Bar, for—

> "The only question that can properly be raised upon this writ, is whether the Circuit Court exceeded its jurisdiction in holding the petitioner for a contempt and imposing upon him a fine therefor."
>
> *Ex parte Lennon, supra*, 553.

In this portion of appellee's brief, as a further contention that the assignment of errors cannot import into a cause questions of jurisdiction which are not found presented by the record, are cited as authority therefor: *The Bayonne*, *Ansbro* v. *United States*, and *Cornell* v. *Green* (Brief, p. 7). Of course this contention is sound, but are these really pertinent precedents here? In *The Bayonne* and *Ansbro* v. *United States*, both cases related to the violation of an act of Congress prohibiting the placing or depositing of refuse matter into the tidal waters of the harbor of New York, and imposing a fine or imprisonment therefor. In the former case *in rem* proceedings were instituted against a ship for depositing ashes in the prohibited waters, the said proceedings being intended to secure the payment of the fine. In the latter case Ansbro was indicted for dumping injurious deposits within the forbidden limits. No question of jurisdiction was raised during the progress of the trials or otherwise presented, save in the latter case a certificate of jurisdiction was made at a subsequent term of the Court, and an effort was made to have the same treated *nunc pro tunc*.

In *Cornell* v. *Green* the Court held that no constitutional

question at all was presented to the trial Court, therefore no assignment of error could cover the question in the appellate court.

But in the case at Bar the facts are entirely different, for it is submitted the record shows that the trial Court had of necessity to pass upon the very question presented in the assignment of errors; and that this assignment of errors did not originate the questions of error, but was really a statement of such questions of error as were contained in the record and passed upon by the trial Court.

Fourth.

The fourth contention of the appellee is that upon an appeal from a judgment on the *habeas corpus* proceeding, no question of the jurisdiction of the Court to enjoin a criminal prosecution in the State Court can be raised.

Reference is made to the appellant's original brief on page 4, as containing a complete answer to this contention. But admitting, for the sake of argument merely, the position of the appellee that the *habeas corpus* proceeding is a collateral attack of the injunctive decree, yet how can the judgment, alone and disconnected with the injunction proceedings, releasing the prisoner from imprisonment and from bail by means of this writ, fail to be reviewed in this Court? Take this naked judicial act, and does it not present a jurisdictional and constitutional question of the gravest moment? It was surely illegal to have awarded the injunction in question; but what of the further act withholding the State from even exacting bail or any security for the presence or return of the prisoner to its jurisdiction? Mark the argument of the appellee that this injunction is only temporary; yet the very action of the State Court to secure the presence of the prisoner when this "temporary injunction" has run its uncertain course is denied to the State by the Federal Court.

FIFTH.

The fifth ground of the appellee as to why this Court should not assume jurisdiction of this appeal, is that the record does not show that the appeal "allowed was ever filed in the United States Circuit Court."

The record itself is avouched to show the incorrectness of this contention and that the law applicable has been complied with in every respect.

A. J. MONTAGUE,

Attorney-General of Virginia,
and ex-officio Counsel for Appellant.